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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

KENNETH M. WALTON, DBA WALTON BACKHOE SERVICE and K. WALTON ENTERPRISES, INC., DBA LAW PLUMBING CO.,
Petitioners,

VS.

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST, and OPERATING TRAINING TRUST,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Can a signatory employer's obligations under a collective bargaining agreement to make trust fund contributions be imposed upon a concurrently existing non-signatory employer solely on the basis of common ownership and management when neither the requirements for imposing liability under the common law doctrine of piercing the corporate veil nor the requirements for imposing liability under the National Labor Relations Board single employer doctrine have been satisfied?

(2) Can a signatory employer's obligations under a collective bargaining agreement to make trust fund contributions be imposed upon a non-signatory employer on the basis that the non-signatory employer is the alter-ego of the signatory employer when there is no showing that the alter-ego enterprise grew out of an attempt to evade obligations under a collective bargaining agreement?

LIST OF PARTIES

The parties to the proceeding below were:

Petitioners, Kenneth M. Walton, dba Walton Backhoe Service and K. Walton Enterprises, Inc., dba Law Plumbing Co.

Respondents, Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust.

There are no parent or subsidiary companies of any corporate party.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD ISSUE	9
I.	
Principles of Common Law Doctrine of Piercing the Corporate Veil or Single Employer Doctrine Have Not Been Applied	10
II.	
The Alter Ego Test Still Requires Showing of Fraud or Intent to Avoid Union Obligations	16
CONCLUSION	21

TABLE OF AUTHORITIES

Cases

Page

Board of Trustees v. Valley Cabinet & Manufacturing Company, 877 F.2d 769 (9th Cir. 1989) 17, 19, 20

Brick Masons Pension Trust v. Industrial Fence and Supply, 839 F.2d 1333 (9th Cir. 1988).....17, 19

A. Dariano & Sons v. Dist. Council No. 33, 869 F.2d 514, 517-518 (9th Cir. 1989).....10, 15, 18

Fall River Dyeing & Finishing Corp. v. NLRB, 482 US 27, 107 S.Ct. 2225, 96 L.Ed.2d 22 (1987) ...15, 16

NLRB v. Burns International Security Services, Inc., 406 US 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972) 16

NLRB v. Don Burgess Construction Corp., 596 F.2d 378, 386 (9th Cir. 1979) 10, 11

New England Mechanical, Inc., dba Independent Plumbing Co. v. Laborers Local Union 294, 909 F.2d 1339, 1344 (9th Cir. 1990) 14

Operating Engineers Pension Trust v. A-C Company, 859 F.2d 1336, 1341-1342 (9th Cir. 1988) 11, 19

Seymour v. Hull & Moreland Engineering, 604 F.2d 1105, 1109-1114 (9th Cir. 1979).....10, 13

Statutes

28 U.S.C. § 1254(1) 2

Section 302 of the Labor Management Relations Act of 1947 (29 U.S.C. § 186) 2, 9

29 U.S.C. § 185(a) and 29 U.S.C. § 1132..... 2

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Petitioners, Kenneth M. Walton, dba Walton Backhoe Service and K. Walton Enterprises, Inc., dba Law Plumbing Co., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the proceedings below on July 18, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported. It is printed in the Appendix hereto, p.1a, *infra.*

The decision of the United States District Court for the Central District of California is not reported. The District Court's Findings of Fact and Conclusions of Law are printed in the Appendix hereto, p.9a, *infra*.

STATEMENT OF JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 18, 1991. A petition for rehearing and suggestion for rehearing *en banc* was filed by Petitioners. The petition was denied and the suggestion for rehearing *en banc* rejected, both on October 1, 1991.

The jurisdiction of this Court to review the judgment and opinion of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Section 302 of the Labor Management Relations Act of 1947 (29 U.S.C. § 186) is printed in the Appendix hereto, p.28a, *infra*.

STATEMENT OF THE CASE

The case is an action brought by a group of union trust funds to collect sums alleged to be owed to them pursuant to a Collective Bargaining Agreement. Subject matter jurisdiction was vested in the District Court under 29 U.S.C. § 185(a) and 29 U.S.C. § 1132.

This case arises as a result of the execution of a Collective Bargaining Agreement by one of Petitioners, Kenneth M. Walton, in an individual capacity, with the Operating Engineers Union, Local 12, in March 1986. The Agreement was executed by Walton in order to provide

for Union Trust Fund contributions for one employee, Ronald Kinsley, who was hired by Walton to operate a backhoe. The liability for Union contributions was never intended to extend beyond contributions for the benefit of this one person; yet as a result of Walton's ownership interest in a separate corporation, K. Walton Enterprises, Inc., dba Law Plumbing Co., a huge liability has been imposed against Walton and the corporation.

Walton's signature as an individual on the Collective Bargaining Agreement with Local 12 has been attributed to the corporation and all of its activities unintentionally. An important issue in this case is the intent of the signatory to the contract, and whether or not there was either any plan to include the activities of the corporation as well as the sole proprietorship, or, as a corollary to a perceived intention, whether or not Walton was attempting in any way to deprive the Operating Engineers Union Trust Funds of benefits to which they would otherwise have been entitled.

The answer to this last question presumes an understanding of facts showing that Walton's intention never changed — he subscribed to the Collective Bargaining Agreement for the sole purpose of benefitting his one Operating Engineer employee, and he continued to make payments for the benefit of that employee notwithstanding his ownership of the stock in K. Walton Enterprises, Inc., dba Law Plumbing Co.

There was never an intention to include activities of Law Plumbing Co., either before or after Walton, as an individual, signed the Agreement; and the fact that the accounting of Law Plumbing Co. and Walton Backhoe was commingled never changed that intention, altered its implementation, or resulted in any detriment to the Operating Engineers Trust Funds which did not exist prior to

the commingling of accounting records. Petitioner submits that the United States Court of Appeals never understood this, nor did the U.S. District Court for the Central District of California. Their perception of the facts, such as they were analyzed, concludes that commingling in itself must somehow have been intended to take advantage of the Operating Engineers Trust Funds; this is not the case.

Kenneth M. Walton was thirty years old at the time of trial of this case in the U.S. District Court in December 1989. He is a plumber by trade, and has been a member of the Plumbers and Pipefitters Union during most of his working life. Prior to the events leading up to the judgment in this case, Ken Walton was an employee of Law Plumbing Company, Inc., a California corporation owned by Walton ("Bill") and Millie Law. Walton worked for Law Plumbing Company, Inc. for approximately fifteen years, progressing from a laborer to the position of a journeyman plumber.

In 1985, Bill Law, contemplating retirement, took the corporation's backhoe to Idaho to complete excavation work on his retirement home. Ken Walton was left to manage Law Plumbing Company, Inc.

Walton, without a backhoe, was forced to subcontract that work to businesses capable of handling excavation work needed by Law Plumbing Company, Inc. The corporation, Law Plumbing Company, Inc., was a signatory to a Collective Bargaining Agreement with the Plumbers and Pipefitters Local 364. All of its plumber employees were members of that union. Law Plumbing Company, Inc. was not a signatory to a Collective Bargaining Agreement with the Operating Engineers. Law Plumbing Company, Inc. employed no operating engineer-type employees.

Walton, who was not an owner of Law Plumbing Company, Inc. at the time, decided that it would be a good idea to set up his own backhoe operation. He approached Bill Law, and asked if Law had any objection to Walton buying a backhoe to service the needs of Law Plumbing Company, Inc. independently as well as other customers. Law said that he did not care so long as it did not interfere with Law Plumbing's activities.

Kenneth Walton bought a backhoe with his own money, and set up a sole proprietorship, Walton Backhoe Service, in April 1985. He hired an old work acquaintance, Ron Kinsley, to operate the backhoe. Kinsley was a member of the Operating Engineers Local 12, and had not been doing well as a member of the Union in the State of Utah. He was happy to work for Walton Backhoe even though the latter had not subscribed to a union contract at that time.

Kinsley came to work for Walton in April 1985. Kinsley worked for Walton for nearly a year, receiving no union benefits because Walton had not subscribed to a Collective Bargaining Agreement. Kinsley was a good worker, and when he worked his way up the seniority ladder with the union hall to a point where he could expect regular employment, he approached Walton and advised him that the latter would have to join the Union in order to retain the full services of Kinsley, or lose him to union jobs.

In March 1986, Walton and Kinsley visited the Local 12 Union offices, and Walton executed a Collective Bargaining Agreement individually, as a sole proprietorship, in the name of Kenneth M. Walton, dba Walton Backhoe. Thereafter, Walton paid Union Trust Fund contributions on behalf of Kinsley for all work he performed on the backhoe. Payments were made from a sole proprietorship bank account for some period of time, but

they were also made from the corporation, Law Plumbing Company, Inc., as were a lot of other expenses, the circumstances of which are described below.

Toward the end of 1985, Walton, managing Law Plumbing Company, Inc., began to negotiate with Bill Law for the purchase of the plumbing business. Beginning in January 1986, Walton was managing Law Plumbing Company, Inc. for his own account, subject to striking an agreement for the purchase of the business with Bill Law. The parties negotiated the values of Law Plumbing Company assets, disagreeing on many points, and a formal contract was not executed for the acquisition of the assets of Law Plumbing Company, Inc. by Walton and Law until August 1986.

For the purpose of buying the business, Walton established his own corporation in February 1986, K. Walton Enterprises, Inc. This corporation ultimately purchased the assets of Law Plumbing Company, Inc., subject to certain of its liabilities, and all of the stock of the corporation was owned by Kenneth M. Walton.

During the time this occurred, Ron Kinsley continued to provide backhoe services to Law Plumbing Company, Inc. and to other customers under the sole proprietorship established by Walton in 1985, Walton Backhoe.

If it were not for the commingling of accounting, the problem resulting in the substantial liability and judgment against K. Walton Enterprises dba Law Plumbing Co. would never have occurred. It is eminently clear from the facts that the sole proprietorship, Walton Backhoe, had independent significance. It was formed in 1985 before Walton acquired any interest in Law Plumbing Company, Inc.; it was organized under independent circumstances because of Law Plumbing Company, Inc.'s

owner removing its backhoe from operations; it hired a union employee and operated for nearly a year without joining the Union; and, as a sole proprietor, it subscribed to a Collective Bargaining Agreement with Operating Engineers Local 12 in March 1986 under the name of Kenneth M. Walton, dba Walton Backhoe, solely because its one employee, Ron Kinsley, threatened to leave for better opportunities.

If there had been no commingling of financial affairs, it is hard to see how the Operating Engineers Trust Funds could assert that the liability of the sole proprietorship's Collective Bargaining Agreement extended to K. Walton Enterprises, Inc., dba Law Plumbing Co.

There is something sinister about the word, "commingling." Where it is present, it suggests that some malfeasance is involved. From the beginning of 1986, bills, including Kinsley's wages and maintenance expenses for the backhoe, were paid from the accounts of Law Plumbing Company, Inc. under the management of Kenneth Walton. Walton was confident that he would strike a deal with Bill Law for the purchase of the business, and so he paid these bills from the corporation's bank accounts set up by Kenneth M. Walton for Law Plumbing Co.

Bills were also paid from the sole proprietorship bank account. One thing that is clear though, is that Ron Kinsley's Trust contributions were continually made for his work on the backhoe, whether made from sole proprietorship funds or Cashier's Checks purchased with Law Plumbing Company, Inc. funds. The funds of the two entities were commingled, stupidly, but in good faith. Walton consulted with his accountant, Leo Giroir, who had also been the accountant for Law Plumbing Company, Inc. under the ownership of Bill Law. Giroir advised that since there appeared to be no difference in

ownership of the entities, there seemed nothing wrong with commingling the financial affairs. Giroir testified that he had no knowledge of the Collective Bargaining Agreement which had been signed by Kenneth M. Walton individually with the Operating Engineers; and so it went.

Upon audit of the financial affairs of Walton Backhoe by the Operating Engineers in 1988 and again in 1989, it became apparent that there were no significant independent records of the sole proprietorship, Walton Backhoe. Records presented reflected that payments had been made for Kinsley's salary, contributions to the Trust Funds for Kinsley, and other Walton Backhoe expenses by the corporation, Law Plumbing Co., as well as Walton Backhoe. Law Plumbing Co., of course, was now a dba of K. Walton Enterprises, Inc.

The auditor, confronted with Law Plumbing Co. records, set up Trust Fund deficiencies for all of that corporation's subcontractors and owner/operators who were perceived to be non-union entities, and, penalties were asserted against Law Plumbing Co. for the claimed violation of Walton Backhoe's Collective Bargaining Agreement. Law Plumbing Co. had never executed a Collective Bargaining Agreement. The Agreement executed by Kenneth M. Walton, dba Walton Backhoe was, by inference, and as a result of the commingling of financial affairs, assumed by the auditor to be the responsibility of Law Plumbing Co.

In effect, the liability to the Operating Engineers was artificially expanded as a result of the audit, resulting in a substantial windfall to the Union Trust Funds. These funds had no prior expectation of obtaining contributions in any manner from Law Plumbing Co. for Operating Engineers work performed by non-employees. Law Plumbing Co., being a plumbing organization and a signa-

tory to a Collective Bargaining Agreement with the Local Plumbers and Pipefitters Union, never contemplated contributions to another union. At the same time, contributions for and on behalf of Ron Kinsley were continuously made both before and after Walton's acquisition of Law Plumbing Co. The Operating Engineers had no right to expect any less than that, nor any more.

Although at trial the Trust Funds argued that K. Walton Enterprises, Inc. was a sham and that Law Plumbing Co. was acquired by Walton individually, the District Court did find that K. Walton Enterprises, Inc. did acquire the assets of Law Plumbing Company, Inc. (Findings of Fact and Conclusions of Law, paragraph 6, Appendix, p.12a, *infra.*)

There are no facts to show that the Operating Engineers received less than they were entitled to as a result of K. Walton Enterprises, Inc.'s acquisition of Law Plumbing assets.

The District Court found in favor of the Trust funds as to all amounts claimed to be due and entered judgment accordingly. On appeal by Petitioners, the Court of Appeals affirmed.

REASONS WHY THE WRIT SHOULD ISSUE

Section 302(a) of the Labor-Management Relations Act (29 U.S.C. § 186) generally prohibits an employer from paying or agreeing to pay money to a labor organization. Section 302(c)(5) creates an exception for contributions to union trust funds for the benefit of the employers and their families if certain stringent requirements are satisfied. One of those requirements is that "the detailed basis on which such payments are to be made is specified in a *written agreement* with the employer . . ."

(§ 302(c)(5)(B) [emphasis added.] This requirement is usually satisfied by having the employer sign a short form collective bargaining agreement. This case presents the issues of when an employer who has not signed a written agreement may nonetheless be bound by the obligations of an employer who is a signatory to such an agreement.

I. Principles of Common Law Doctrine of Piercing the Corporate Veil or Single Employer Doctrine Have Not Been Applied.

Until the Court of Appeal's decision in this case, there were only two circumstances under which a signatory employer's obligations under a collective bargaining agreement could be imposed upon a concurrently existing non-signatory employer.

One set of circumstances was where the requirements of the common law doctrine of piercing the corporate veil were satisfied. These required a showing that: (1) no respect is shown for the separate entities as to corporate vs. shareholder formalities; (2) there must be some injustice visited upon the litigants if the corporate entity is fully recognized as being independent; and (3) there must be some fraudulent intent on the part of the shareholders. (*Seymour v. Hull & Moreland Engineering,* 604 F.2d 1105, 1109-1114, (9th Cir. 1979).)

The second was under the single employer doctrine, a concept formulated by the NLRB to address so-called double-breasted operations. In addition to a showing of the four controlling criteria of interrelation of operations, common management, centralized control of labor relations and common ownership, it must also be shown that the employees of *both* entities constitute an appropriate bargaining unit. (*A. Dariano & Sons v. Dist. Council No. 33,* 869 F.2d 514, 517-518, (9th Cir. 1989); *NLRB v.*

Don Burgess Construction Corp. 596 F.2d 378, 386 (9th Cir. 1979).)

Given the written agreement requirement, there is no room for the judiciary to create new doctrines for imposing liability on a concurrently existing non-signatory employer outside those situations where well-established common law principles or the NLRB would bind such a non-signatory employer to the obligations of a collective bargaining agreement. Yet, that is precisely what the Court of Appeals did in this case.

Without any discussion of its prior decisions or the statutory requirements, the Ninth Circuit held that a non-signatory employer is jointly and severally liable for a signatory employer's obligations solely on the basis of common ownership and management without the need to satisfy the more stringent criteria of the single employer test or the piercing of the corporate veil. (Appendix, p.5a, *infra.*) The Ninth Circuit accomplished this by a single sentence reference to *Operating Engineers Pension Trust v. A-C Company,* 859 F.2d 1336, 1341-1342 (9th Cir. 1988):

> "The evidentiary record fully supports the trial court's finding that Walton operated a single integrated business enterprise under the names of Walton Backhoe Service, Law Plumbing Company, and Law Plumbing Co., Inc., and Walton is bound by the Master Agreement he signed with Local 12, *regardless of whether he used the name of Walton Backhoe Service or Law Plumbing Company.*" [emphasis supplied]

This makes Law Plumbing Co. guilty by association and imposes an unfair standard prejudicial against employers in dealings with organized labor and Union Trust

Funds. It is an overreaching display of Union Trust Fund protectionism. In *Walton,* the Operating Engineers Trust Funds never had an original expectation that they could collect penalties from Law Plumbing Co. for employing owner/operators or independent subcontractors. By making the Agreement executed by Walton Backhoe apply to Law Plumbing Co., it effects no situation in which fairness is finally realized by the Union Trust Funds, but effects a windfall for the Union Trust Funds to which they had no reasonable expectation.

The *A-C Company* Court, without any discussion of authorities, ruled that a signatory employer could be held liable for work performed for commonly-owned non-signatory employers. In concluding that work performed for non-signatory employers under common ownership, the Ninth Circuit ruled, almost as an aside, the following:

> "The only difference between the present case and our previous split-time cases is that in this case, some of the non-MLA work the employees performed was not for A-C, but was A-C Paving or A-C Union. We do not consider this distinction determinative since all three businesses are owned, managed and operated by Robert. Thus, A-C is liable for contributions on a basis of a minimum of forty hours a week.
>
> "We observe that an important reason for the adoption of the JCB resolution was to minimize the possibility that employers would manipulate accounting records to make it appear that employees were not performing MLA work. The trusts argue, persuasively, that it would place an undue burden on most trust funds to require them to perform the investigatory accounting work necessary to insure the accuracy of employer contributions where employers purport to split their employees' time between bar-

> gaining unit and non-bargaining unit work. Here, Robert, as the common owner, manager and operator of the three businesses, could readily manipulate the payroll records of all three businesses to show that his employees worked for A-C Paving or A-C Union when they were in fact performing MLA work for A-C." (pp. 1341-1342)

The Court apparently found no need to conclude or even analyze other standards cited in *Seymour v. Hull and Moreland Engineering, supra.*, such as (1) there must be some injustice visited upon the litigants if the corporate entity is fully recognized as being independent; and (2) there must be some fraudulent intent on the part of the shareholders (pp. 1109-1114); nor did the *A-C* court examine the single employer tests.

The only reference in *Walton* to any wrongdoing is found in the Findings of Fact and Conclusions of Law prepared by the Operating Engineers, and adopted without change by the District Court, in paragraph 11:

> "At all times material herein, Walton and Walton, Inc. have exercised such dominion and control over each other so as to cause their separate identities to cease; that the acts, business and contracts of Walton were the acts, business and contracts of Walton, Inc., and vice-versa. Walton and Walton, Inc. have been commonly owned and financed substantially all of their operations and work from a common source of funds. Walton and Walton, Inc. knew, or had reason to know, that the other did not have sufficient assets, capital or income to otherwise pay current operating expenses or outstanding debts. Walton and Walton, Inc. each benefitted and profited from each other's work and labor covered by the provisions of the Agreement and Master Agreement. *Adherence to the*

> *fiction of Walton and Walton, Inc.'s separate existence would, under such circumstances, promote and sanction a fraud and injustice.*" (Appendix, p.13a, *infra.*) [emphasis added]

What fraud and injustice? The opposing party did not deny that the Collective Bargaining Agreement was executed by Walton individually for the sole proprietorship, Walton Backhoe, solely to benefit the only union employee, Ron Kinsley. Walton Backhoe had independent significance initially because it was set up prior to K. Walton Enterprises, Inc.'s acquisition of the business, Law Plumbing Co. There was never a commitment by Law Plumbing Co. to pay penalties for subcontractors and owner/operators, most of whom had done business with Law Plumbing Company, Inc. for years prior to the acquisition by Walton. Operating Engineers had no reasonable expectation to the contrary.

Accepting as true all of the factual recitals in the Ninth Circuit's Memorandum of Opinion (Appendix, p.1a, *infra*), this would not establish a fraud or injustice, or recharacterize the windfall which the Operating Engineers have obtained in this decision, nor would it explain by legal precedent Law Plumbing Co's intention not to assume the terms of the Collective Bargaining Agreement beyond the intended obligation to make contributions for the benefit of Ron Kinsley. Even if the District Court was correct, and the entities, K. Walton Enterprises, Inc., dba Law Plumbing Co. and Kenneth M. Walton, dba Walton Backhoe, constitute a "single integrated business," Law Plumbing Co.'s intention, as a non-signatory, to assume the terms of the Collective Bargaining Agreement, must be explicit (absent fraud or injustice). *New England Mechanical, Inc., dba Independent Plumbing Co. v. Laborers Local Union 294*, 909 F.2d 1339, 1344 (9th Cir. 1990).

The other standard which has been employed in the past for determining the existence of a single employer, requires a showing that employees of both entities constitute a single bargaining unit. *A. Dariano & Sons v. Dist. Council No. 33,* 869 F.2d 514, 517-518 (9th Cir. 1989). Law Plumbing Co. employed no operating engineer-type workers. Its only trade employees were plumbers, all of whom were members of a plumbers and pipefitters union. The only operating engineer was Ron Kinsley, the person originally employed by Walton Backhoe. These facts are not refuted by the opposing party, and it is clear that a common bargaining unit does not exist.

The Ninth Circuit has a duty to apply its precedents carefully, and to give Petitioners' appeal a thoughtful analysis. Petitioners believe the Court of Appeals gave them short shrift. Even if K. Walton Enterprises, Inc. and Walton Backhoe are one "single integrated business," and even if Walton Backhoe never had any initial independent significance, then K. Walton Enterprises, Inc. could not be found to be a successor employer of Walton Backhoe; yet, this is precisely what the District Court did. In adopting, carte blanche, the Findings of Fact and Conclusions of Law of the Operating Engineers, the District Court found in paragraph 4 of Conclusions of Law that Walton, Inc. was "a successor to Walton and all of its assets, liabilities. . . ." (Appendix, p.11a). The District Court provided no analysis of this dichotomy in its conclusion, or otherwise attempted to reconcile its pronouncement that one entity was the "successor employer" of the other, with its earlier announcement that the entities constituted "one single integrated business." This suggests that the District may not have understood the case. In fact, the District Court could not have supported its finding of successor employer under the tests laid down by this Court in *Fall River Dyeing &*

Finishing Corp. v. NLRB, 482 US 27, 107 S.Ct. 2225, 96 L.Ed.2d 22 (1987). A major hurdle to the application of *Fall River* in *Walton* was the lack of showing that a majority of the employees of Law Plumbing Co. had been former employees of Walton Backhoe. This is one of the requirements under *Fall River* and its precedents. Law Plumbing always had six to eight plumbers while Walton Backhoe never had more than one backhoe operator.

On appeal, the Operating Engineers steered away from the successor employer issue, and the Court of Appeals did not address it at all. The District Court was either wrong in concluding that Law Plumbing Co. was a successor employer, or that it was part of a single integrated business. No precedents cited by the Ninth Circuit would find both to apply, nor do either the Ninth Circuit or the District Court cite *NLRB v. Burns International Security Services, Inc.* 406 US 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972), or note that *Burns* requires a showing of some rational factual basis for presumptions of majority union support among a successor's work force.

There is no legal concept, "single integrated business." For purposes of finding a non-signatory employer responsible for obligations of a signatory employer, there must be showing of intent to avoid the contract, or a "double-breasted" arrangement beholding a single bargaining unit.

II. The Alter Ego Test Still Requires Showing of Fraud or Intent to Avoid Union Obligations.

The Ninth Circuit erroneously concludes that K. Walton Enterprises, Inc., dba Law Plumbing Co., and Kenneth M. Walton, dba Walton Backhoe are "alter egos" of each other. This is accomplished in its summary reference to the District Court's Findings of Fact and Conclu-

sions of Law. (Appendix, p. 9a, *infra*). Neither the facts at the time of trial justified a finding of fraud, bad faith or effort to deprive the interest of a collective bargaining agreement, nor do the facts recited in the Ninth Circuit's Memorandum of Unpublished Opinion. There is no better recitation than in the Ninth Circuit Memorandum on page 6, reciting from the District Court's Findings of Fact and Conclusions of Law, as follows:

> "... Walton, Inc. has been used by Walton as a technical change in operations to attempt to avoid the obligations of the Agreement ...."

No facts recited support that statement. Walton, Inc. was set up after Walton Backhoe. Walton Backhoe's commitment to the Operating Engineers' Collective Bargaining Agreement never changed from its original commitment until the time of the commingling of funds with Law Plumbing Co. Contributions to Trust Funds were always made for and on behalf of Ron Kinsley in either case. There never was any other commitment. Commingling of funds by itself does not make one entity liable for the contracts of another entity. *Board of Trustees v. Valley Cabinet and Manufacturing Co.* 877 F.2d 769 (9th Cir. 1989).

There are no alter ego cases which do not require a showing that the separate entity was designed or established for the purpose of circumventing the obligations one party has under a union contract. In *Brick Masons Pension Trust v. Industrial Fence & Supply* 838-839 F.2d 1333 (9th Cir. 1988), the court concluded that the mere fact of a close relationship between two related companies did not necessarily result in the conclusion that one was the alter ego of the other. In that case there was no such finding, as the companies targeted different markets, and one company was formed at a different time than the

other company (p. 1337). The court stated that the critical inquiry was whether or not the employer was using a non-union company in a sham effort to avoid the collective bargaining obligations (p. 1336).

In *A. Dariano & Sons, Inc. v. District Council No. 33* 869 F.2d 514 (9th Cir. 1989), the Ninth Circuit restated both the single employer and the alter ego test employed by that court to find one employer liable for the union obligations of another employer. As to the alter ego test, the court enumerated five requirements:

1. Interrelation of operations;

2. Common management;

3. Centralized control of labor relations;

4. Common ownership;

5. A disguised continuance of the same business or an attempt to avoid obligations through a sham transaction or a technical change in operations.

On this latter point, the court cites numerous cases, establishing the ingredients of this principle, and adds the following at p. 518:

> "If the transfer is bona fide, the successor is not bound by a prior collective bargaining agreement. If the transfer is designed to avoid the NLRA by setting up what appears to be a new company, but it is in reality a "disguised continuance" of the old one, the Board will find the successor company as an alter ego of the old company, and therefore bound by its predecessor's collective bargaining agreement."

The other cases cited by the Ninth Circuit all stand for the same proposition; there must be some wrongdoing or effort on the part of defendant to take advantage of the

union by setting up another entity to avoid the terms of a collective bargaining agreement. In *Brick Masons Pension Trust v. Industrial Fence and Supply* 839 F.2d 1333 (9th Cir. 1988), the court said the separate non-union company must be a sham effort to avoid collective bargaining obligations (p. 1336) if liability is to be found. It also said that the fact of a close relationship between companies did not necessarily mean that one was the alter ego of the other. If the companies target different markets, and union members in a unionized company are different from those in the other company, alter ego would be inapplicable (p. 1337).

Both the Ninth Circuit and the District Court have wandered far afield from the law in this case. The Ninth Circuit's decision in *Operating Engineers Pension Trusts v. A-C Company, supra,* is incorrect in that its standard in considering the failure of independence of commonly-controlled companies does not require a showing of fraud, wrongdoing or effort, to disregard the terms of a collective bargaining agreement.

It concludes that the relationship itself is enough to find a non-signatory employer liable for a signatory employer's agreement. This goes beyond traditional alter ego tests, and suggests that neither the Ninth Circuit, nor the District Court have properly analyzed the facts in this case. The commingling of the financial affairs of the entities appears to these courts to be crime, and that is not the law.

A significant injustice will be done to a petitioner if it cannot obtain a writ in this case. It is necessary for justice to be served that this Court force a closer examination of the facts to discover that there are no facts to show that Law Plumbing Co. is responsible for the contract signed by Walton Backhoe Services. In *Board of*

Trustees v. Valley Cabinet & Manufacturing Company 877 F.2d 769 (9th Cir. 1989), the Ninth Circuit pronounced that the mere fact of commingling of funds alone was not enough to apply common law principles of alter ego. In that case the evidence showed that corporate formalities were not observed, but this fell far short of demonstrating any deliberate misuse of the corporate form or any fraudulent intent in forming it (p. 773).

CONCLUSION

The *A-C Company* case cannot be allowed to stand, as it imposes no restrictions on a court's arbitrary determination that commonly-owned companies, because of that fact alone, must be doing something wrong. The Walton problem is a continuing one, going far beyond the $120,000 judgment presently asserted against Walton. There has already been another lawsuit filed by the Operating Engineers for audit of Law Plumbing Co.'s affairs in subsequent years. Even if this Court does not formally hear this matter, it should at least order the Ninth Circuit to specify which facts in the case led it to conclude that Law Plumbing Co. is the alter ego of Walton Backhoe, and responsible for the latter's Collective Bargaining Agreement beyond the scope of Kenneth Walton's commitment at the time he personally executed the contract. The facts recited in the Court's Memorandum of Decision do not persuade. Petitioners have lost everything. The District and Ninth Circuit decisions have missed the mark. It is submitted that in other areas of the law the mere commingling of financial affairs does not result in *ad hoc* assump-

tion of contract liabilities — only union cases in the Ninth Circuit so resolve. That is not, and should not, be the law.

DATED: December 30, 1991

Respectfully submitted,

REDWINE AND SHERRILL

Gary E. Reddish, Esq.
Attorneys for Petitioners,
Kenneth M. Walton,
dba Walton
Backhoe Service, and
K. Walton Enterprises, Inc.,
dba Law Plumbing Co.

DOCUMENT 1

Nos. 90-55591, 91-55032

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST, and OPERATING ENGINEERS TRAINING TRUST,
Plaintiffs-Appellees,

vs.

KENNETH M. WALTON, dba WALTON BACKHOE SERVICE; K. WALTON ENTERPRISES, INC. dba LAW PLUMBING CO., "sub nomine" LAW PLUMBING CO., INC.
Defendants-Appellants.

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Joseph Reichmann, Magistrate, Presiding
DC No. CV-88-6191-JR

Submitted July 11, 1991**
Pasadena, California

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Filed: July 18, 1991
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: POOLE, KOZINSKI and LEAVY, Circuit Judges.

Kenneth M. Walton (Walton) appeals the district court's determination that he owed $84,975.55 in unpaid fringe benefits and penalties to a group of four related Operating Engineers employee benefit plans (the Trusts) under a collective bargaining agreement with the International Union of Operating Engineers, Local Union No. 12 (Local 12).

Walton contends that the trial court erred in concluding that Walton's various business entities operated as a single integrated business and as such was bound by the collective bargaining agreement (the Master Agreement), and that the trial court also erred in holding that the business entities were alter egos and as such were jointly and severally liable to the Trusts. In a consolidated appeal, Walton protests that attorney's fees ought not to have been awarded to appellees; that the amount of the award was unreasonable; and that appellees are not entitled to attorney's fees incurred on this appeal. This court has jurisdiction over the final disposition of all claims by the district court under 28 U.S.C. § 1291. We affirm.

Walton did business as an individual, "Walton," under the names Walton Backhoe Service, Law Plumbing Co., Inc. and Law Plumbing Company. Walton also formed "Walton Enterprises Inc." in February, 1986, which did business as Walton Backhoe Service, Law Plumbing Co., Inc. and Law Plumbing Company.

"Walton"	"Walton Enterprises, Inc."
Walton Backhoe Service	Walton Backhoe Service
Law Plumbing Co., Inc.	Law Plumbing Co., Inc.
Law Plumbing Company	Law Plumbing Company

Walton had signed the Master Agreement with Local 12 on March 10, 1986 in his capacity as "Walton Backhoe Service," sole proprietor, and not as Walton Enterprises, Inc. Under the terms of the Master Agreement, Walton made a commitment to pay fringe benefits to the Trusts and not to subcontract work under Local 12's "craft jurisdiction" to non-signatory employers and to owner-operators. EXH 2 at 1.1[1]

Walton ran his businesses by means of a single office, a single bank account, a single clerical employee, and a single set of books and records. RT (Tape) 26ff; RT 140. He "put them [the companies] all together." RT 181; RT (Tape) 28. From 1986 until 1988, Walton paid fringe benefit contributions to the Trusts on behalf of his backhoe operator, Ronald Kinsley, only for the hours that Kinsley actually operated the backhoe. Walton paid these contributions by means of cashier's checks with funds drawn from the Law Plumbing Co. bank account. RT 193-94. An auditor employed by the Trusts was sent to Walton's offices to perform an audit on April 7, 1988. The auditor reviewed the books and records for March 10, 1986 through March 31, 1988 and concluded that Walton had not properly reported and paid fringe benefit contributions to the Trusts as required by the Master Agreement. EXH 18; RT 19-20. The auditor also determined

[1]EXH are exhibits admitted into evidence at trial; ER are the excerpts of record on appeal; RT is the reporter's official transcript of proceedings in the district court; and RT (Tape) refers to the reporter's official transcripts of proceedings in the district court on the morning of December 12, 1989.

that Walton had subcontracted covered work to non-signatory subcontractors and to several owner-operators, in violation of the Master Agreement. RT 21; EXH 4, 8-15, 95-99. The Trusts had one of their auditors perform a second audit on May 17 and May 26, 1989, who reached similar conclusions. EXH 18 at 3.

The Trusts sued Walton for breach of contract, and after a bench trial on December 12 and 13, 1989, the district court determined that Walton owed the unpaid fringe benefits, damages from work assigned to non-signatory subcontractors or owner-operators in violation of the Master Agreement, interest, penalties and attorney's fees.

I.

Walton and Walton Enterprises, Inc. are a single integrated business, bound by the Master Agreement.

The district court found as a factual matter that "at all times after January 1, 1986, Walton operated Walton Backhoe Service, Law Plumbing Company and Law Plumbing Co., Inc. as a single integrated business." ER 10 at 3. A district court's findings of fact are reviewed under the clearly erroneous standard. Rule 52(a), F.R.Civ.P.; *Kruso v. International Telephone and Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990). Questions of law, such as the interpretation of the contractual provisions in the Master Agreement, are reviewed *de novo*. *Kemmis v. McGoldrick*, 706 F.2d 993, 996 (9th Cir. 1983).

The evidentiary record fully supports the trial court's finding that Walton operated a single integrated business enterprise under the names Walton Backhoe Service, Law Plumbing Company and Law Plumbing Co., Inc., and

Walton is bound by the Master Agreement he signed with Local 12, regardless of whether he used the name of Walton Backhoe Service or Law Plumbing Company. See *Operating Engineers Pension Trust v. A-C Company*, 859 F.2d 1336, 1341-2 (9th Cir. 1988).

Under the Master Agreement, Walton and Walton Inc. were bound to pay fringe benefit contributions for all hours worked by or paid to employees performing any work "of the nature included in the craft jurisdiction of the Union." EXH 2 at 1. This Circuit has repeatedly interpreted and enforced the identical language of the Agreement in disputes between Local 12 and the Southern California General Contractors Association. See *Kemmis v. McGoldrick*, 706 F.2d at 996-97; *Waggoner v. Wm. Radkovich Co., Inc.*, 620 F.2d 206 (9th Cir. 1980); *Waggoner v. C & D Pipeline Co.*, 601 F.2d 456 (9th Cir. 1979); *Burke v. Lenihan*, 606 F.2d 840 (9th Cir. 1979).

The Supreme Court has upheld the type of subcontracting provision provided for in the Master Agreement. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982). The trial court found that Walton's subcontracting of work covered under the Master Agreement to owner-operators damaged the Trusts in the amount of $35,636.47, and that his subcontracting to non-signatory entities damaged the Trusts in the amount of $7,922.58. These amounts were calculated using the appropriate methodology. RT 26. *See generally Walsh v. Schlecht*, 429 U.S. 401 (1977); *Brogan v. Swanson Painting Co.*, 682 F.2d 807 (9th Cir. 1982); *Operating Engineers Pension Trust v. Cundiff*, 619 F.Supp. 1003 (C.D. Cal. 1985).

Walton furnished no invoices during the 1988 audit, and furnished only some invoices during the 1989 audit. Walton had the burden of coming forward with the invoices to prove any inaccuracy in the audits. *Brick Masons*

Pension Trust v. Industrial Fence & Supply, Inc., 839 F.2d 1333, 1338-39 (9th Cir. 1988).

II.

Walton and Walton Enterprises, Inc. are alter egos, jointly and severally liable to the Trusts.

Whether the businesses were alter egos is a factual question reviewed for clear error. *Brick Masons Pension Trust v. Industrial Fence & Supply*, 839 F.2d at 1336; *Sheet Metal Workers Local No. 359 v. Arizona Mechanical & Stainless, Inc.*, 863 F.2d 647, 652 n.5 (9th Cir. 1988).

Here, the district court found that,

> at all times material herein, Walton and Walton, Inc. have had common management, centralized control of labor relations and an interrelation of operations such that Walton and Walton Inc. are 'alter egos' of each other. Walton Inc. has been used by Walton as a technical change in operations to attempt to avoid the obligations of the Agreement . . . .

ER 10 at 4. These are the appropriate standards for finding an alter ego under *Brick Masons Pension Trust*, 839 F.2d at 1336-37 and *Crawford Door Sales and Carpenters District Council of Miami*, 226 NLRB No. 174 at 1144, 94 LRRM 1393, 1394 (1977) (alter ego status is determined if two enterprises have "substantially identical management, business purpose, operation, equipment, customers and supervisors as well as ownership"). *See also Southport Petroleum v. NLRB*, 315 U.S. 100, 106 (1942) (holding that alter ego analysis focuses on whether there was a "*bona fide* discontinuance and a true change of ownership . . . or merely a disguised continuance of the old employer"); *A. Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, 519 (9th

Cir. 1989) (establishment of the alter ego enterprise must grow out of an attempt to evade obligations under a collective bargaining agreement.)

The district court's findings of common ownership, interrelation of operations and centralized control of employees as between Walton and Walton, Inc. are supported by the record and are not clearly erroneous.

III.
Attorney's Fees

The award of attorney's fees reasonably incurred by the Trusts in recovering amounts due to the Trusts is mandatory under 29 U.S.C. § 1132(g). *Operating Engineers Pension Trust v. Cecil Backhoe Service, Inc.*, 795 F.2d 1501, 1508 (9th Cir. 1986); *Operating Engineers Pension Trust v. Reed*, 726 F.2d 513, 514 (9th Cir. 1984). We have held that "[i]n determining reasonable attorney's fees, the district court should consider the relevant factors as outlined in *Seymour* [*v. Hull & Moreland Engineering*, 605 F.2d 1105, 1117 (9th Cir. 1979)]." *Kemmis v. McGoldrick*, 706 F.2d at 997-98.[2] The Trusts submitted evidence to the district court on the properly relevant factors, ER 4 at 3-10, and the trial judge weighed these relevant factors in determining the reasonable amount of attorney's fees

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[2]These relevant factors are the same as in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied* 425 U.S. 951 (1976) and include: The time and labor required; the novelty and difficulty of the questions presented; the skill required to perform the legal service properly; the preclusion of other employment; the customary fee; the time limitations imposed by client or circumstances; the amount involved and the results obtained; the experience, reputation and ability of the attorneys; the notice and length of the professional relationship with the client; awards in similar cases; and several other factors not relevant to this litigation.

awarded to the Trusts. ER 4 at 1-2. Under *Operating Engineers Pension Trust v. Cecil Backhoe*, 795 F.2d at 1508, the Trusts should be awarded the amount of attorney's fees reasonably incurred in this appeal.

The district court's findings were not clearly erroneous. AFFIRMED.

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Case No. CV 88-06191 JR

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OPERATING ENGINEERS PENSION TRUST, et al.,
Plaintiffs,

vs.

KENNETH M. WALTON, etc., et. al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed March 30, 1990
Clerk, U.S. District Court
Central District of California

By: _____ , Deputy

DOCUMENT 2

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CASE NO. CV 88-06191 JR

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OPERATING ENGINEERS PENSION TRUST, et. al.,
Plaintiffs,

VS.

KENNETH M. WALTON, etc., et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-captioned case came on regularly before the Honorable Joseph Reichmann, United States Magistrate presiding, sitting without a jury, on December 12, 1989. Michael A. Urban and Stephanie J. Hart of Jett & Laquer appeared as counsel for plaintiffs, Operating Engineers Pension Trust, et al. Gary E. Reddish of Redwine & Sherrill appeared as counsel for defendants Kenneth M. Walton, etc., et al. The trial was conducted pursuant to the Pre-Trial Conference Order, the documentary and oral evidence presented at trial and the oral arguments by counsel. The case having been submitted to the Court for decision, the Court now makes the following Findings of Fact and Conclusions of Law.

I

FINDINGS OF FACT

1. Plaintiffs are the Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Training Trust (hereinafter "Trusts").

2. The Trusts are joint labor-management employee benefit trusts which were established and exist pursuant to written declarations of trust (hereinafter "Trust Agreements") between the International Union of Operating Engineers, Local Union No. 12 (hereinafter "Local 12") and various multi-employer associations in Southern California and Southern Nevada. The Trusts were created and now exist pursuant to § 302(c) of the Labor-Management Relations Act of 1947, as amended (hereinafter "LMRA") [29 U.S.C. § 186(c)].

3. Local 12 has been and is a labor organization representing employees in the building and construction industry in Southern California and Southern Nevada, and the labor organization which represented employees of defendants in a business affecting interstate commerce within the meaning of § 301(a) of the LMRA [29 U.S.C. § 185(a)].

4. At all times material herein, defendant Kenneth M. Walton (hereinafter "Walton") has been an individual doing business as Walton Backhoe Service, Law Plumbing Company and Law Plumbing Co., Inc., with his principal place of business located in San Bernardino, California.

5. At all times material herein, defendant K. Walton Enterprises, Inc. (hereinafter "Walton, Inc."), has been a corporation organized and existing by virtue of the laws

of the State of California with its principal place of business located in San Bernardino, California.

6. By an agreement dated August 29, 1986, Walton formed Walton, Inc., and purchased the assets of Law Plumbing Co., Inc., from Walton Law and Millie Law, president and secretary respectively, of Law Plumbing Co., Inc. However, the actual transfer of assets from Law Plumbing Co., Inc., to Walton, Inc., took place in January, 1986, prior to the execution of the agreement of purchase.

At all times after January 1, 1986, Walton operated Walton Backhoe Service, Law Plumbing Company and Law Plumbing Co., Inc., as a single integrated business.

7. On March 10, 1986, Walton executed and delivered a written collective bargaining agreement to Local 12 (hereinafter "Agreement") whereby Walton agreed to be bound by the terms and conditions, with certain exceptions, of certain written and existing agreements between various multi-employer associations and Local 12. In particular, Walton agreed to be bound by the Master Labor Agreement (hereinafter "Master Agreement") in effect in the area in which Walton was working at that time.

8. Walton also signed written acknowledgements and acceptances of the respective Trusts ("Trust Agreements") on March 10, 1986. By doing so, Walton became obligated to all of the terms and conditions of the Trust Agreements, including the obligation to pay fringe benefit contributions to the Trusts for all hours worked by or paid to employees doing work covered by the Master Agreement.

9. At all times material herein, Walton and Walton, Inc., have been affiliated businesses with common officers, ownership, management, and supervision, have formu-

lated and administered a common labor policy affecting the employees of said operations, have shared common premises and facilities, have provided services for and made salaries to each other, have interchanged or transferred personnel with each other, and have held themselves out as a single integrated business enterprise such a way that Walton and Walton, Inc., constitute a "single employer." The acts, business and contracts of Walton have been the acts, business and contracts of Walton, Inc. The duties, rights and obligations of Walton, including but not limited to obligations of the Agreement, Master Agreement and Trust Agreements, have been the duties, rights and obligations of Walton, Inc.

10. At all times material herein, Walton and Walton, Inc., have had common management, centralized control of labor relations and an interrelation of operations such that Walton and Walton, Inc., are "alter egos" of each other. Walton, Inc., has been used by Walton as a technical change in operations to attempt to avoid the obligations of the Agreement, Master Agreement and Trust Agreements.

11. At all times material herein, Walton and Walton, Inc., have exercised such dominion and control over each other so as to cause their separate identities to cease; that the acts, business and contracts of Walton were the acts, business and contracts of Walton, Inc., and vice versa. Walton and Walton, Inc., have been commonly owned and financed substantially all of their operations and work from a common source of funds. Walton and Walton, Inc., knew, or had reason to know, that the other did not have sufficient assets, capital or income to otherwise pay current operating expenses or outstanding debts. Walton and Walton, Inc., each benefited and profited from each other's work and labor covered by the provisions of the

Agreement and Master Agreement. Adherence to the fiction of Walton and Walton, Inc.'s separate existence would, under such circumstances, promote and sanction a fraud and injustice.

12. At all times material herein, Walton and Walton, Inc., have been obligated to the terms and provisions of the Agreement, Master Agreement and Trust Agreements.

13. At all times material herein, a backhoe owned by Walton was used by both Walton and Walton, Inc., and was stored at the same location in San Bernardino, California. This backhoe was used by both entities without regard to leases or payment for usage and was operated by Ron Kinsley, an employee who worked for both Walton and Walton, Inc.

14. By the Master Agreement and Trust Agreements, and at all times material herein, Walton and Walton, Inc., were obligated to submit written reports to the Trusts on a timely basis showing the identities of their employees performing work covered by the Master Agreement and the number of hours worked by or paid to those employees. Further, Walton and Walton, Inc., promised they would pay fringe benefit contributions to the Trusts on a monthly basis and at specified rates for each such hour worked by or paid to their employees covered by the Master Agreement. At all times material herein, Walton and Walton, Inc., were obligated to submit said monthly reports and pay said contributions to the Trusts at their administrative offices in Pasadena, California, on or before the tenth (10th) day of each successive month.

15. On or about April 7, 1988, May 17, 1989, and May 26, 1989, the Trusts, by their duly authorized representative, conducted audits of the payroll and related

records of Walton and Walton, Inc., for the time period from March 10, 1986, through April 30, 1989.

16. Based on the review of the defendants' payroll and related records, the Trusts prepared a claim for amounts due pursuant to the Agreement and Master Agreement by Walton and Walton, Inc. This claim was made for unpaid fringe benefit contributions on behalf of an employee of Walton and Walton, Inc., who performed work covered by the Master Agreement during the period of March 10, 1986, through April 30, 1989, in the amount of $15,038.70. The Trusts also claimed damages for breach of contract in the amount of $35,784.07 for Walton and Walton, Inc.'s breach of Article XVI, Paragraph T, of the Master Agreement by failing to make owner-operators bona fide employees and failing to report and pay fringe benefit contributions to the Trusts based on hours worked by or paid to these owner-operators. In addition, the Trusts claimed damages for breach of Article I, Paragraph B-10, of the Master Agreement prohibiting the subcontracting of work covered by Master Agreement to non-signatory employers in the amount of $7,922.58. The damages for the subcontracting and owner-operator violations portion of the Trusts' claim have been calculated by determining the amount of contributions which would have otherwise been paid to the Trusts but for the breaches of the Master Agreement.

17. During the period of March 10, 1986, through April 30, 1989, Ron Kinsley was employed by Walton and/or Walton, Inc. Mr. Kinsley performed work within the craft jurisdiction of the operating engineers as defined in the Master Agreement.

18. During the period March 10, 1986, through April 30, 1989, Walton and/or Walton Inc., subcontracted work covered by the Master Agreement to non-signatory

owner-operators known as Bowman Backhoe, Terry's Backhoe Service, Don's Backhoe Service, Dennis Scott Bowman Backhoe, Ellingson Backhoe, Kelly's Earthworks, Turner Tractor, Valley Backhoe, Don Herrill, and Roger Smith.

19. During the period of March 10, 1986, through April 30, 1989, Walton and/or Walton, Inc., subcontracted work covered by the Master Agreement to the non-signatory entities of Val Stuart Paving Company, Sun Construction, Highland Crane, Avila Construction and Kelly's Concrete Pumping.

20. Until the Trusts were able to conduct a complete audit of the payroll and related records of Walton and Walton, Inc., they were unable to verify that Walton and Walton, Inc., had failed to comply with the terms of the Agreement and Master Agreement.

21. Non-union employees can participate in the benefit plans established by the Trust Agreements. *See, e.g.*, Article I, Section 3, of the Operating Engineers Pension Trust Agreement. The Trusts cannot discriminate against covered employees on the basis of union membership [29 U.S.C. § 158(a)(3)].

22. Payroll employees who performed covered work for Walton or Walton, Inc., but who were not obtained through the Union hiring hall are considered "dispatched" by Local 12 for purposes of eligibility for wages and benefits under the terms of the applicable Master Agreement. Dispatch records are maintained internally by Local 12 for the purpose of preventing favoritism in hiring of out-of-work members, when there are any.

23. Walton and Walton, Inc. have violated 29 U.S.C. § 1145. The Trusts are entitled to payment from Walton and Walton, Inc. of $15,038.70 in unpaid fringe benefit

contributions, $35,636.47 in breach of contract damages for use of owner-operators and $7,922.58 in breach of contract damages for use of nonsignatory subcontractors.

24. Pursuant to 29 U.S.C. § 1132(g)(2)(B), the Trusts are entitled to prejudgment interest on the unpaid fringe benefit contributions and damages from the date each payment became due to the Trusts through the scheduled date of trial, at the rates established by 26 U.S.C. § 6621. Walton and Walton, Inc. owe the Trusts prejudgment interest of $12,976.40.

25. Pursuant to 29 U.S.C. § 1132(g)(2)(C) and the Master Agreement, the Trusts are also entitled to liquidated damages in an amount equal to prejudgment interest or ten percent (10%) of the contributions due, whichever is greater. Walton and Walton, Inc. owe the Trusts liquidated damages of $12,976.40.

26. Pursuant to Article XVIII of the Master Agreement and 29 U.S.C. § 1132(g)(2)(D), the Trusts are entitled to their audit costs of $425.00, their attorneys' fees in an amount to be established by post trial motion, and their court costs.

27. Any Conclusion of Law which is deemed to be a Finding of Fact is incorporated into these Findings of Fact.

II

CONCLUSIONS OF LAW

1. Any Conclusion of Law which may be either a Conclusion of Law or a Finding of Fact shall be treated as both a Conclusion of Law and a Finding of Fact.

2. At all times since January 1, 1986, Walton and Walton, Inc. have operated as a single integrated busi-

ness under the exclusive control of Kenneth M. Walton. Therefore, both Walton and Walton, Inc., are bound to the obligations of the Agreement, Master Agreement and Trust Agreements.

3. Walton, Inc., at all times material herein has been an alter-ego of Walton bound to the terms of the Agreement, Master Agreement and Trust Agreements between Local 12 and Walton, including the obligation to report and pay fringe benefit contributions to the Trusts for all employees who perform any work covered by the Master Agreement. *See Brick Masons Pension Trust v. Industrial Fence & Supply, Inc.*, 839 F.2d 1333 (9th Cir. 1988); *Gateway Structures, Inc. v. Carpenters 46 Northern California Counties Conference Board of Carpenters*, 799 F.2d 485 (9th Cir. 1985); *Northern Administrators, Inc. v. Con Iverson Trucking, Inc.*, 749 F.2d 1338 (9th Cir. 1984) and *J. M. Tanaka Construction, Inc. v. N.L.R.B.*, 675 F.2d 1029 (9th Cir. 1982).

4. Walton, Inc., at all times material herein has been a successor to Walton and all of its assets, liabilities and contracts, including the Agreement, Master Agreement and Trust Agreement. *See Trustees for Alaska Laborers v. Ferrell*, 812 F.2d 512 (9th Cir. 1987); *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27, 107 S.Ct. 2225, 96 L.Ed.2d 22 (1987); and *Audit Services, Inc. v. Rolfson*, 641 F.2d 757 (9th Cir. 1981).

5. At all times material herein, Walton and Walton, Inc. have been bound by the Agreement, Master Agreement and Trust Agreements.

6. It is a well settled rule that the Master Agreement that Walton and Walton, Inc., are bound to requires the payment of fringe benefit contributions for all hours worked by or paid to employees performing any work

covered by the Master Agreement. In *Waggoner v. C & D Pipeline Co.*, 601 F.2d 267 (9th Cir. 1979); *Burke v. Lenihan*, 606 F.2d 840 (9th Cir. 1979); *Waggoner v. Wm. Radkovich Co., Inc.*, 620 F.2d 267 (9th Cir. 1980); *Waggoner v. Dallaire*, 649 F.2d 1362 (9th Cir. 1981); and *Kemmis v. McGoldrick*, 706 F.2d 993 (9th Cir. 1983), the Ninth Circuit has interpreted and enforced the identical language in the Master Agreement between Local 12 and the Southern California General Contractors Association. Walton and Walton, Inc. have failed to pay fringe benefit contributions of $15,038.70 on behalf of Ron Kinsley who performed covered work, and this amount is due to the Trusts.

7. In addition, the Master Agreement that Walton and Walton, Inc., have been bound to expressly requires signatory employers to only subcontract work covered by the Master Agreement to contractors who are signatory to the proper craft agreements. These types of subcontracting provisions have been upheld by the United States Supreme Court. *Woelke & Romero Framing, Inc. v. N.L.R.B.*, 465 U.S. 645, 102 S.Ct. 2071 (1982).

The Trusts are entitled to damages from Walton and Walton, Inc., in the amount of $7,922.58 for this breach of the Master Agreement. This amount is equal to the amount of fringe benefit contributions that would have otherwise been paid on behalf of the employees of subcontractors who were performing covered work by the Master Agreement. *See Walsh v. Schlecht*, 429 U.S. 401, 97 S.Ct. 679 (1977); *Brogan v. Swanson Painting Co.*, 682 F.2d 807 (9th Cir. 1982); *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1114-15 (9th Cir. 1979). The Trusts are entitled to receive payments from Walton and Walton, Inc., measured by the hours of compensation to the non-signatory subcontractors, at rates provided in the Master

Agreement, even if these subcontractors were treated as independent contractors, were ineligible to qualify for benefits from the Trusts, or were paid benefits directly. *Ibid.* An employer's obligation to pay into a § 302(c)(5) trust can be measured by any standard acceptable to the union and the employer. *Burke v. French Equipment Rental, Inc.*, 687 F.2d 307 (9th Cir. 1982). The obligation to subcontract only to signatory subcontractors is clearly set forth in the Master Agreement. Therefore, the Trusts are entitled to damages of $7,922.58 for this breach of the express terms of the Master Agreement.

8. As part of their claim, the Trusts have included damages for breach of the owner-operator provisions of the Master Agreement. Damages for this claim by the Trusts total $35,636.47. This Court has previously enforced similar owner-operator language and awarded damages, as is the case here, where the amounts are calculated by measuring the amount of contributions which would have otherwise been paid. *See Operating Engineers Pension Trust v. Cundiff*, 619 F.Supp. 1003 (D.C. Cal. 1985). Like damages for use of a non-signatory subcontractor, these amounts are collectible even if the owner-operators are treated as independent contractors, are ineligible to qualify for benefits from the Trusts or were paid benefits directly. *See Walsh v. Schlecht; Brogan v. Swanson Painting Co.*; and *Seymour v. Hull & Moreland Engineering, supra.* The Trusts are entitled to payment of these damages from Walton and Walton, Inc.

9. In addition to the fringe benefit contributions and breach of contract damages above, the Trusts are entitled to prejudgment interest in the sum of $12,976.40, audit costs of $425.00, liquidated damages of $12,976.40 and reasonable attorneys' fees in an amount to be determined by the Court pursuant to the Master Agreement and 29

U.S.C. § 1132(g)(2). *See Operating Engineers Pension Trust v. Reed*, 726 F.2d 513 (9th Cir. 1984); *Kemmis v. McGoldrick*, 706 F.2d 993 (9th Cir. 1983).

10. The Trusts are also entitled to their costs of suit from Walton and Walton, Inc.

11. All amounts due to the Trusts by Walton and Walton, Inc., shall be due jointly and severally.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 30, 1990

UNITED STATES MAGISTRATE

DOCUMENT 3

Nos. 90-55591
91-55032

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPERATING ENGINEERS PENSION TRUST,
OPERATING ENGINEERS HEALTH AND WELFARE FUND,
OPERATING ENGINEERS VACATION-HOLIDAY
SAVINGS TRUST,
and OPERATING ENGINEERS TRAINING TRUST,
Plaintiffs-Appellees,

VS.

KENNETH M. WALTON, dba
WALTON BACKHOE SERVICE;
K. WALTON ENTERPRISES, INC. dba
LAW PLUMBING CO.,
"sub nomine" LAW PLUMBING CO., INC.
Defendants-Appellants.

Appeal from the United States District Court
for the Central District of California
Joseph Reichmann, Judge Magistrate, Presiding
DC No. CV-88-6191-JR

ORDER

Filed October 1, 1991
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: POOLE, KOZINSKI AND LEAVY,
Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, this petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

DOCUMENT 4

Filed November 14, 1990

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OPERATING ENGINEERS PENSION TRUST, et al.,
Plaintiffs,

vs.

KENNETH M. WALTON, etc., et al.,
Defendants.

Case No. CV 88-6191 JR

ORDER RE ATTORNEYS' FEES

This matter came on regularly for hearing on the plaintiffs' motion for attorneys' fees on May 21, 1990, before the Court, the Honorable Joseph Reichmann, United States Magistrate, presiding. Stephanie J. Hart of the law firm of Jett & Laquer, appeared as counsel for the plaintiffs and moving parties, Operating Engineers Pension Trust, et al., Gary E. Reddish of the law firm of Redwine & Sherrill appeared as counsel for defendants Kenneth M. Walton, etc., et al. The Court has reviewed the moving and responding papers filed by the parties and considered the arguments of counsel and finding good cause to exist,

IT IS HEREBY ORDERED that Kenneth M. Walton, Walton Backhoe Service, Law Plumbing Co., Inc., and Law Plumbing Company and K. Walton Enterprises, Inc., shall be jointly and severally obligated to pay the sum of $42,247.50 to plaintiffs, Operating Engineers Pension Trust, et al., as reasonable attorneys' fees incurred in prosecuting this action and in presenting their motion for fees.

Plaintiffs requested $51,772.50. Defendants did not contest the hourly rates but contended that the amount of hours was unreasonable. This Court agrees in some instances. In arriving at the amount of $42,247.50, the Court has made the following deductions:

1. Depositions of Walton & Barlow	— $1,200
2. Trial preparation (50 hours less at $120 per hour)	— $6,000
3. Trial December 12, 13, 1989 (Eliminate fee of 2nd trial lawyer — 15.5 hours × $150 per hour)	— $2,325
	— $9,525.00

In making this award of reasonable attorneys fees, the Court has considered the factors outlined in the Ninth Circuit decisions in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975) and *Southland v. International Long Shoreman's & Warehousemen's Union, Local 8*, 834 F.2d 790 (9th Cir. 1987). The Court finds that this amount is a reasonable fee in light of a review of those factors.

DATED: November 14, 1990.

JOSEPH REICHMANN
United States Magistrate

DOCUMENT 5

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Operating Engineers Pension Trust, et. al.,
Plaintiffs,

vs.

KENNETH M. WALTON, etc., et al.,
Defendants.

NO. CV. 88-6191-JR

JUDGMENT

Filed March 30, 1990
Clerk, U.S. District Court
Central District of California
By Deputy

Pursuant to the Court's Findings of Fact and Conclusions of Law filed on March 30, 1990,

IT IS ADJUDGED that:

1. Plaintiff is awarded the sum of $84,975.55 as follows:

a. Contributions	$15,038.70
b. Owner/Operator Damages	35,636.47
c. Non-Union Subcontracting Damages	7,922.58
d. Liquidated Damage	12,976.40
e. Audit Costs	425.00
f. Interest	12,976.40

g. Court costs and attorney fees to be established, and --

2. Defendant shall take nothing from plaintiff in this action.

DATED: March 30, 1990.

JOSEPH REICHMANN
United States Magistrate

DOCUMENT 6

SUBCHAPTER IV — LIABILITY OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 186. *Restrictions on financial transactions*

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his

actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 10102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor

organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment bene-

fits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to

clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Manage-

ment Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalty for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

Jurisdiction of courts

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

Effective date of provisions

(f) This section shall not apply to any contract in force on June 28, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

Contributions to trust funds

(g) Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective

agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.